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In The

Supreme Court of the United States

October Term, 1997

CONGRESS OF CALIFORNIA SENIORS, ET AL.,

Petitioners,

v.

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The First Appellate District Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Equal Protection Clause permits California to:

a. single out one class of auto accident victims – uninsured motorists – and prohibit them from recovering for their pain and suffering in an accident as to which, because they were not at fault, their uninsured status has no relevance;

b. deny full recovery to low-income plaintiffs injured in automobile accidents unless they purchase insurance that may cost as much as one-fifth of their annual income but that is sold for much lower prices to high-income motorists; and

c. discriminate among similarly situated tort defendants solely on the basis of whether the person they hit was uninsured or not, relieving one group of any obligation to pay damages for pain and suffering while the other group must fully compensate the victim.

2. Whether the Due Process Clause permits California to:

a. impose a new penalty for driving uninsured that is only invoked literally "by accident" and that varies enormously in amount in direct proportion to how badly the uninsured driver is injured; and

b. deprive uninsured auto accident victims of their right to recover for pain and suffering without providing them with an opportunity to demonstrate that they mistakenly believed they were insured, that they could not obtain insurance, or that the cost of obtaining insurance was prohibitively high for them and their families.

PARTIES TO THE PROCEEDING

The parties to the Court of Appeal proceeding are the following:

Petitioners:	Congress of California Seniors, Utility Consumer Action Network, Proposition 103 Enforcement Project, Southern California Organizing Committee, Consumer Attorneys of California, Latino Issues Forum, The Greenlining Institute, Howard Owens, Ina De Long, and David S. Casey, Jr.
Respondents:	Chuck Quackenbush, Insurance Commissioner of the State of California; Peter G. Stamison, Director of the Department of General Services of the State of California; and Kathleen Connell, Controller of the State of California

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Congress of California Seniors, et al., respectfully petition for a writ of certiorari to review the judgment of the First Appellate District of California.

OPINIONS BELOW

The opinion of the First Appellate District of California (Appendix 1-21) is reported at 60 Cal. App. 4th 454, 70 Cal. Rptr. 2d 271 (1997). The order of the First Appellate District denying petitioners' petition for rehearing (App. 22-23) is not reported. The order of the California Supreme Court denying petitioners' petition for review of the First Appellate District's opinion (App. 28) is not reported. The order of the Superior Court of the City and County of San Francisco (App. 29-34), which was reversed by the opinion of the First Appellate District, is not reported.

JURISDICTION

The Court of Appeal of California, First Appellate District, entered its judgment on December 24, 1997. App. 1-21. The Court of Appeal denied a timely petition for rehearing on January 23, 1998. App. 22-23. The California Supreme Court denied petitioners' Petition for Review of the First Appellate District's opinion on March 25, 1998. App. 28. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 3333.4 of the California Civil Code provides:

> (a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies:
>
> > (1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense.
> >
> > (2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.
> >
> > (3) The injured person was the operator of a vehicle involved in the accident and the

operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state.

(b) Except as provided in subdivision (c), an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a).

(c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages.

STATEMENT OF THE CASE

California voters approved Proposition 213, the "Personal Responsibility Act of 1996," on November 5, 1996. The measure adds sections 3333.3 and 3333.4 to the California Civil Code. Section 3333.3 limits the recovery of convicted felons for injuries proximately caused by the injured person's commission of a felony or flight therefrom. Section 3333.4, which is the subject of this lawsuit,[1]

[1] Petitioners challenge only the provisions that apply to uninsured motorists (Cal. Civ. Code §§ 3333.4(a)(2), 3333.4(a)(3) and 3333.4(b)), not the provisions relating to felons and drunk drivers.

prohibits uninsured drivers and drivers convicted of driving under the influence of alcohol or drugs from recovering damages for their pain and suffering when they are injured in auto accidents.

On December 17, 1996, consumer groups and individuals, including the Congress of California Seniors, brought an action for injunctive and declaratory relief in the Superior Court for the City and County of San Francisco. As taxpayers and in their representational capacity, plaintiffs challenged the uninsured driver provisions of Proposition 213 on the grounds that "Civil Code sections 3333.4(a)(2), 3333.4(a)(3), 3333.4(b) and 3333.4(c) on their face and as applied violate the equal protection provisions of the 14th Amendment of the United States Constitution. . . . " Complaint for Injunctive and Declaratory Relief ("Compl."), First Cause of Action, ¶ 19. Plaintiffs also alleged that "Civil Code sections 3333.4(a)(2), 3333.4(a)(3), 3333.4(b) and 3333.4(c), on their face and as applied violate the due process provisions of the Fourteenth Amendment to the United States Constitution. . . . " Compl., Second Cause of Action, ¶ 30.

On April 4, 1997, the Superior Court for the City and County of San Francisco issued a preliminary injunction prohibiting defendants from expending any State funds or resources for implementation of the uninsured motorist provisions of Proposition 213 on the grounds that the measure violated the equal protection guarantees of the U.S. and California Constitutions and contained "other constitutional infirmities" not discussed in the order. App. 29-34. The court also overruled defendants' demurrer. App. 35-36.

In response, defendants filed an appeal from the preliminary injunction and a petition for a writ of mandate challenging the order overruling their demurrer. In their return to the writ petition, plaintiffs argued that the uninsured driver provisions of Proposition 213 violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Return of Real Parties in Interest to Petition for Writ of Mandate ("Return"), pp. 18-39 ("Proposition 213 violates the equal protection clauses of the state and federal constitutions."). Plaintiffs also argued that the measure violates the Due Process Clause of the Fourteenth Amendment. Return, pp. 48-60 ("Proposition 213 violates the due process clauses of the state and federal constitutions.")

On December 24, 1997, the First Appellate District of the Court of Appeal of the State of California vacated the injunction and barred further proceedings in the underlying action. App. 2. The court endorsed the decision of the Second Appellate District of California in *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 68 Cal. Rptr. 553 (1997), which upheld the prospective and retroactive application of Proposition 213 against equal protection and due process challenges. *Id.* The court also rejected arguments raised by petitioners that were not addressed by the *Yoshioka* court, holding that the "measure is not rendered invalid because it imperfectly accomplished its secondary goals" of "balancing rights among members of the disfavored groups and facilitating determining which persons would be included in the disfavored groups." App. 15.

The Court of Appeal denied plaintiffs' petition for rehearing on January 23, 1998. App. 22-23. Because it

decided the identical issues in response to the petition for writ of mandate, the court dismissed the appeal as moot. App. 26-27. The California Supreme Court denied petitioners' Petition for Review on March 25, 1998. App. 28.

REASONS FOR GRANTING THE WRIT

California is one of several states that have limited damages for uninsured plaintiffs in automobile accident cases. The trend is to reduce insurance costs by making one group, uninsured plaintiffs, pay for the harm caused by a different group, uninsured defendants.

The unfairness of this scheme is compounded by the fact that in California, as in many states, the cost of insurance varies widely throughout the state and is inversely correlated with personal income. Thus, an individual in South Central Los Angeles, where the average per capita income is only $7,299, will pay $1,432 for minimum insurance coverage. Another individual only a few miles away in Palos Verdes, where the average per capita income is $42,586, will pay only $696 for the same coverage. These kinds of disparities are bad enough under mandatory insurance laws that allow private insurance companies to determine who will be entitled to drive and how much one must pay for that privilege. When payment of these premiums becomes a prerequisite to legal recovery, however, fundamental principles of equal protection and due process prohibit a state from conditioning access to justice on the uncertain fairness of the insurance industry.

The statute at issue here, known as Proposition 213, precludes uninsured drivers from recovering damages for pain and suffering, physical impairment, or disfigurement, even when the uninsured driver caused no injury, was in no way negligent, and was the undisputed victim of another driver's negligence, recklessness or even intentional wrongdoing. The California courts have upheld the statute as a rational and permissible distinction between those who are "law-abiding" and those who are not. A classification so vague, and one that results in a penalty that varies so widely and is imposed literally "by accident," cannot withstand even rational relationship analysis.

Proposition 213 does not merely pit the insured against the uninsured, however. It classifies among the uninsured, irrationally allowing uninsured *owners* to recover against drunk drivers while prohibiting uninsured *operators* from doing so. Unable to rationalize the distinction, the court below created new equal protection jurisprudence by holding that a statute's "secondary" classifications need not even pass the rational relationship test.

Proposition 213 discriminates arbitrarily among motorists who are defendants as well. The motorist who happens to hit an uninsured motorist is relieved of any obligation to pay damages for pain and suffering. This is the rule whether the motorist who caused the accident is insured or not. The driver who hits an insured driver, however, is fully liable for all of the accident victim's pain and suffering even though he may be less culpable than the driver whose accident victim was uninsured.

California is a bellwether state. Popular proposals adopted in California make their way across the country, state by state. Unless this Court grants certiorari, Proposition 213 will serve as an open invitation to carve out special, irrational penalties for unpopular groups, in direct violation of the Equal Protection and Due Process Clauses of the Constitution.

I. PROPOSITION 213 VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT

A. Arbitrary Classifications Violate Equal Protection

More than 75 years ago, this Court made clear that equal protection requires that a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair* and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (emphasis added); *see* also *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 81 (1968) (Harlan, J. dissenting) (some "classifications are impermissible because they bear no intelligible proper relation to the consequences that are made to flow from them"). A law must fall if it arbitrarily discriminates either within the class it establishes or between members of the delineated class and other persons similarly situated with respect to the law. *McLaughlin v. Florida*, 379 U.S. 184, 189-91 (1964); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966). Thus, this Court has invalidated statutes that place particular burdens on one group while

others similarly situated are exempt. *See*, e.g., *Smith v. Cahoon*, 283 U.S. 553, 567 (1931) (striking down requirement that some carriers, but not others, purchase insurance because " '[s]uch a classification is not based on anything having relation to the purpose for which it is made.' " [citation omitted]).

The singling out of an unpopular group to bear a burden is a particularly egregious example of an equal protection violation. In *Glona v. American Guarantee Co.*, 391 U.S. 73 (1968), this Court held that a Louisiana wrongful death statute that denied a tort cause of action to parents of illegitimate children violated equal protection guarantees. The Court reasoned:

> [W]e see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors.
>
> *Glona v. American Guarantee Co.*, 391 U.S. at 75 (citation omitted).

Likewise, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), invalidated a city zoning ordinance that required a special use permit for the operation of a home for mentally retarded people, but had no such requirement for fraternities, boarding homes, sanitariums or other group homes.

More recently, this Court invalidated a Colorado law that made it more difficult for homosexuals to participate in the political process than for other citizens. *Romer v. Evans*, 517 U.S. 620, 633-35 (1996).

This Court has long held that when a state distinguishes among similarly situated plaintiffs in their right to particular judicial remedies, the usual deference to the legislative judgment gives way to the courts' "attentive judgment." *Truax v. Corrigan*, 257 U.S. 312, 338 (1921).

In *Lindsey v. Normet*, 405 U.S. 56 (1972), for example, the Court found a double-bond requirement that applied only to tenants who appealed their eviction unconstitutional. The Court was not persuaded by claims that the bond, and its forfeiture in the event the appeal was unsuccessful, were justified by state interests in the ultimate payment of rent, in preventing frivolous appeals, and in compensating successful landlords for the unlawful holding over. *Id.* at 76-78. The Court specifically noted that:

> No other appellant is subject to automatic assessment of unproved damages. We discern nothing in the special purposes of the FED statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination.
>
> *Id.* at 78.

In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), the Court invalidated a state legislative scheme that required criminal defendants who unsuccessfully appealed in forma pauperis from their convictions using a county-subsidized transcript to pay the cost of the transcript from their prison work pay. The Court held that this statute

invidiously discriminated between prisoners, on the one hand, and those defendants whose penalty was a fine, a suspended sentence, or probation on the other hand. It contravened the equal protection requirement that "in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.' " *Id.* at 309 (citing cases).

It is clear therefore that California may not single out a particular group of auto accident victims by denying them damages for pain and suffering unless the law is rationally related to a legitimate state interest.[2]

B. Proposition 213 Arbitrarily Classifies Uninsured Motorists in Violation of Equal Protection

1. Singling out uninsured auto accident victims does not further the purposes of Proposition 213

Proposition 213 targets the subgroup of uninsured drivers who have not caused an accident but rather have been injured by another's negligence. It does so in the name of reducing "skyrocketing" insurance rates and overcrowded court dockets and to encourage compliance

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[2] Even if the state could theoretically eliminate recovery for noneconomic damages altogether, it cannot arbitrarily withdraw that recovery from one class.

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

Id. at 310; *accord Lindsey v. Normet*, 405 U.S. at 77.

with a state law that mandates the purchase of auto insurance. Proposition 213, Findings and Declaration of Purpose, § 2, App. 55-56; *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 983, 68 Cal. Rptr. 2d 553, 559 (1997). There is no rational basis, however, for singling out uninsured auto accident victims to achieve these goals.

The problem of "skyrocketing insurance costs," if it exists, has nothing to do with "unreasonable" damage awards to auto accident victims who are uninsured. The fact that these individuals – who by definition were not at fault in the accidents in which they were injured – are uninsured has nothing to do with insurance costs. One might as well penalize uninsured pedestrians who are hit or uninsured passengers who are injured, something the statute does not do. It is uninsured motorists who *cause* accidents who raise insurance costs, yet the statute does nothing to reach them.

This is neither a fair nor a rational way to lower insurance costs. The statutory scheme in this instance serves merely to punish a group whose actions are seen as undesirable or "irresponsible" and to benefit all tortfeasors, who are described as "responsible." *See* Prop. 213, § 2, Findings and Declaration of Purpose, App. 55. To charge the cost of achieving such benefits to an unpopular group is arbitrary and violates the basic constitutional guarantee of equal protection of the law. *Romer v. Evans*, 517 U.S. 620, 633-35 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985); *Glona v. American Guarantee Liability Ins. Co.*, 391 U.S. 73, 75-76 (1968); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) ("it is invidious to discriminate against [illegitimate children]

when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." [footnotes omitted]).[3]

The measure is also intended to "restore balance to our justice system" by reducing the number of lawsuits. Proposition 213, Findings and Declaration of Purpose, § 2, App. 56; *Yoshioka v. Superior Court*, 58 Cal. App. 4th at 983, 68 Cal. Rptr. 2d at 554 (1997). Denying compensation to any class of plaintiffs, however, would achieve the same result.

Finally, the measure is intended to encourage personal responsibility and compliance with a state law mandating the purchase of insurance. Proposition 213, Findings and Declaration of Purpose, § 2, App. 55. If the purpose of the statute is truly to encourage personal responsibility, however, then there is no reason to target persons without insurance over persons who drive in unsafe vehicles or run red lights. Unlike the uninsured who are targets of Proposition 213, these individuals are

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[3] It is not enough to conclude, as the Court of Appeal did, that because uninsured drivers do not contribute to the insurance pool, they should not be allowed to take noneconomic damages from it when they are hurt. App. 13-14. There are many types of auto accident victims who do not contribute to the insurance pool and who are not punished by Proposition 213. An uninsured driver who happens to be walking or bicycling when he or she is hit is not affected by the measure. The same is true for those who self-insure, or who drive uninsured but happen to be passengers in someone else's vehicle when they are hit. None of these individuals pays into the California insurance pool, yet they are compensated for their injuries.

far more likely to have caused injury to themselves or others.

Moreover, it is just as "farfetched" to assume that people fail to purchase car insurance in the hopes that they will be injured in a car accident and recover for tort as it is to assume that women have illegitimate children in the expectation that they will be able to recover if the child is killed. *See Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. at 76. The status as "illegitimate" or "uninsured" has nothing to do with whether the person will be injured in an accident.

Thus, the necessary link between the status of the group singled out for differential treatment and any legitimate legislative purpose is missing.

2. Proposition 213's secondary classifications are irrational

Even among the groups it targets, Proposition 213 draws lines that make no pretense of basing penalty upon degree of culpability. Tortfeasors who injure uninsured motorists are immune from liability even for their reckless or intentional acts. Cal. Civ. Code § 3333.4(a) (West 1997). Tortfeasors who injure felons, on the other hand, are immune only for damages caused by negligence; they remain liable for their reckless or intentional acts. *Id.*, § 3333.3.

Worse, felons and persons driving under the influence of drugs or alcohol are subjected to the new law's disabilities only upon criminal conviction, in which the State bears the burden of proof beyond a reasonable

doubt. *Id.*, §§ 3333.3, 3333.4(a)(1). Conviction of a lesser offense, pretrial diversion, or any number of other legal maneuvers can free them from the reach of Proposition 213. An uninsured motorist, on the other hand, enjoys no such leeway. *Id.*, § 3333.4(a)(3).

Proposition 213 also discriminates among uninsured motorists. The measure provides that the uninsured *owner* of a vehicle who is injured by someone convicted of driving under the influence of drugs or alcohol may recover for all injuries, including noneconomic injuries, caused by that person. Cal. Civ. Code § 3333.4(c). No such mitigating exception exists for uninsured operators who borrow someone else's car. Thus, an uninsured owner riding as a passenger in a car operated by someone without independent insurance would be able to recover for noneconomic injuries caused by a drunk or drugged tortfeasor; the uninsured operator in the same car and the same accident would not.

Proposition 213 arbitrarily discriminates among tortfeasors as well. It requires one class of defendants to pay what could amount to millions in noneconomic damages, while another class – those who hit someone who is uninsured – pays nothing at all. Regardless of culpability, one driver, purely by chance, is excused from his obligation to make the accident victim whole while the other driver is not.

Most irrational of all, Proposition 213 grants a windfall to the very group it purports to punish. In an accident between two uninsured motorists, Proposition 213 absolves the one who is at fault, no matter how culpable

he may be, from any liability for his victim's noneconomic damages, merely because the *victim* did not carry insurance. The tortfeasor may have more than enough resources to purchase insurance or satisfy a judgment; it makes no difference. The victim cannot recover noneconomic damages, no matter how badly injured he or she may be nor how permanently.

These anomalies within the classifications drawn by Proposition 213 do nothing to advance any of the interests asserted by the state. They simply demonstrate the irrationality of the statutory scheme.

The Court of Appeal recognized the statute's many anomalies, but instead of requiring some rational connection between the classifications and the goals of Proposition 213, the court developed a new equal protection test. Thus, the court held that these "secondary classifications" need not relate to the purposes of the measure so long as they do not interfere with its primary purpose. App. 14. Applying this novel equal protection doctrine to Proposition 213, the court noted that plaintiffs "level[ ] legitimate criticism against Proposition 213's disparate treatment of different classes of motorists." App. 12. Nevertheless, the court upheld the measure's disparities, describing plaintiffs' arguments as little more than "ways to improve Proposition 213." App. 15.[4]

The Court of Appeal never conducted any inquiry, much less an "attentive" one, into whether Proposition

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[4] The court ignored the fact that because Proposition 213 makes no provision for amendment, it can only be amended by a statute approved by the voters. Cal. Const., art. II, § 10(c).

213 meets the equal protection standard long ago articulated by this Court, that the "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). By ignoring this Court's equal protection jurisprudence, the Court of Appeal's decision opens the doors to new efforts to target unpopular groups as a means of achieving legislative goals that benefit others. In order to prevent further erosion of the guarantee of equal protection, this Court should grant certiorari.

C. The Measure Deprives Uninsured Drivers of Their Right of Access to the Courts

Proposition 213 in essence establishes a cost requirement – the purchase of insurance – for individuals to gain access to the courts for recovery of noneconomic damages. For the poor or those who live in neighborhoods that insurers refuse to cover, it is a requirement that they cannot possibly meet.

The record before the Court of Appeal contains compelling preliminary evidence taken entirely from studies published by the Commissioner of Insurance himself that insurance is either not available to poor and minority drivers in California or is priced so high as to be unobtainable.

A good driver in South Central Los Angeles, with no record of accidents or moving violations, may not be able to obtain insurance at *any* cost. *See* JA 130-180, 182-209

and Calabrese Decl., ¶¶ 6-8 (JA 87-89); Clarke Decl., ¶ 5 (JA 227). In one zip code in South Central Los Angeles (90044), the average premium for a minimum liability policy for a safe driver is $1,432. Commissioner's 1996 Automobile Premium Survey at pp. 5-6 [example 2], JA 141-142. Yet the per capita income in the same zip code is only $7,299. Commissioner's Report on Underserved Communities (1995) at p. CA-1, JA 188. Residents in zip code 90044 are 98.65% minority and the percent uninsured is 67.89. *Id.*[5] Proposition 213 requires drivers in the 90044 zip code to spend twenty percent (20%) of their income on auto insurance or forfeit their right to judicial relief.

By contrast, the average premium for a minimum liability policy for a safe driver in Palos Verdes (90274), a wealthy enclave of Los Angeles, is $696. Commissioner's 1996 Automobile Premium Survey, at pp. 5-6 [example 2], JA 141-142. The per capita income in Palos Verdes is $42,586. Commissioner's Report on Underserved Communities (1995) at p. LA-3, JA 195. Thus, the average resident in Palos Verdes spends less than two percent of his income on automobile insurance. The evidence in the record demonstrates that in California the cost of insurance – and therefore, by virtue of Proposition 213, the ability to obtain noneconomic damages – varies *inversely* with individual wealth.

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[5] Even defendant Quackenbush has admitted that there is a "strong correlation between Percent Uninsured to Percent Minority and Percent Uninsured to Per Capita Income." Commissioner's Report on Underserved Communities (1995) at p. iii, JA 185.

This gratuitous imposition of onerous sanctions solely on the basis of an individual's inability to meet financial requirements constitutes invidious discrimination in violation of the equal protection guarantees. *Tate v. Short*, 401 U.S. 395 (1971).[6]

In *Williams v. Illinois*, 399 U.S. 235 (1970), the Court invalidated a statute that permitted an indigent convicted of petty theft to be incarcerated beyond the otherwise maximum term of imprisonment, because he failed to pay the fine that was part of his penalty. The Court stated in pertinent part:

> On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds.
>
> *Williams v. Illinois*, 399 U.S. at 242; *accord M.L.B. v. S.L.J.* (1996) 519 U.S. 102, 117 S. Ct. 555, 569 (1996).

The presumed ability of California drivers to avoid the disabilities imposed by Proposition 213 by purchasing car insurance is likewise "an illusory choice." For indigents it is an illusory choice because they simply lack the funds either to purchase insurance or to file a bond or other proof of ability to pay with the state. For the working poor and many minority communities the choice is

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[6] It also violates the Due Process Clause: "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971).

equally illusory because insurance policies and practices have resulted in premiums so high as to make insurance constructively unavailable to them.[7] Thus, "[t]he discrimination against the poor . . . is particularly obvious." *Lindsey v. Normet*, 405 U.S. at 79.[8]

II. PROPOSITION 213 DEPRIVES UNINSURED AUTO ACCIDENT VICTIMS OF DUE PROCESS

Even if one could, as a general matter, justify the penalties and burdens that Proposition 213 imposes as a sanction for driving without insurance, the statute is fatally flawed by the automatic and totally unrestrained character of those penalties. The forfeiture worked by Proposition 213 allows no explanations or excuses.

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[7] *See* Calabrese Decl., ¶¶ 6-8 (JA 87-89 & 130-180, 182-209) and De Long Decl., ¶¶ 4-7 (JA 234-236); Rodriguez Decl., ¶¶ 5, 6, 9 (JA 260-261); Shames Decl., ¶ 3 (JA 277-278). The alternatives to insurance – posting bond or posting cash sufficient to show financial responsibility – are even more expensive.

[8] Even the preliminary record before the court demonstrated the close relationship between wealth-based classifications and the sanctions imposed by Proposition 213. Plaintiffs' complaint clearly alleged that, as applied, Proposition 213 unlawfully discriminates on the basis of race, wealth, and ethnicity. JA 10-13 [Complaint at ¶¶ 19, 24, 25]. The Court of Appeal nonetheless ordered that defendants' demurrer be sustained without leave to amend, thereby denying plaintiffs any opportunity to present evidence or to prove their allegations at trial. (App. 21). Constitutional norms require that, at a minimum, plaintiffs be permitted to develop a factual record at trial on the issues of invidious discrimination against the poor and ethnic/racial minorities.

Absent a judicial interpretation to the contrary, the measure allows no opportunity for proof of inability to purchase insurance or other good faith.[9] This sort of automatic penalty scheme violates federal due process and equal protection guarantees. *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983); *see also Lindsey v. Normet*, 405 U.S. 56, 76-79 (1972).

In *Bearden*, this Court invalidated a statute under which a defendant's probation was automatically revoked if he failed to pay the fine and restitution on which probation was conditioned. The Court's reasoning clearly applies here:

> [A] probationer's failure to make sufficient bona fide efforts to seek employment or borrow money in order to pay the fine or restitution may reflect an insufficient concern for paying the debt he owes to society for his crime. In such a situation, the State is likewise justified in revoking probation and using imprisonment as an appropriate penalty for the offense. *But if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no*

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[9] The *Yoshioka* court suggested that if an uninsured driver made "any attempt at all (good faith or otherwise) to buy insurance," Proposition 213 would not apply to him. 58 Cal. App. 4th at 990, 68 Cal. Rptr. 2d at 563. In this case, the Court of Appeal refused to reach the issue, but expressed "extreme skepticism" that an uninsured driver could employ a "de facto" insured theory to avoid the restrictions of Proposition 213. App. 17, fn. 8.

> *fault of his own, it is fundamentally unfair to revoke probation automatically. . . .*
>
> *Bearden v. Georgia,* 461 U.S. at 668-69 (emphasis added) (footnote omitted).

The State justifications rejected by the Court in *Bearden* were similar to those advanced to support Proposition 213. Thus, the Court found the state's interests in punishing people for breaking the law and protecting society insufficient to support the automatic sanctions. The State's claim that its scheme may "spur probationers to try hard to pay" the fines and restitution, was fully served by burdening only those who had not made bona fide efforts. *Bearden v. Georgia,* 461 U.S. at 670-72.

So it is here. Without an opportunity to present evidence as to why they were uninsured, auto accident victims are denied their due process rights.

CONCLUSION

Proposition 213 singles out uninsured drivers who are auto accident victims to pay for tort reform despite the fact that there is no connection between a person's status as uninsured and the fact that he or she has been injured by another driver. Proposition 213 imposes this penalty on uninsured drivers automatically and by chance. Because the cost of insurance varies inversely with a person's wealth, this penalty falls disproportionately on the poor and on minorities. Unless checked by this Court, the message of Proposition 213 will be loud and clear: the legislative power to "create an open

season" on an unpopular group, in the name of a goal that benefits others, is unfettered.

Dated: June 19, 1998

Respectfully submitted,

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CONGRESS OF CALIFORNIA SENIORS, *et al. v.* CHUCK QUACKENBUSH, *et al.*

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHARLES QUACKENBUSH, AS INSURANCE COMMISSIONER, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

CONGRESS OF CALIFORNIA SENIORS et al.,

Real Parties in Interest.

A078530

(San Francisco County Super. Ct. No. 983314)

(Filed Dec. 24, 1997)

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Proposition 213, adopted by the voters in November 1996, restricts damage recovery for certain categories of injured automobile owners and drivers in actions arising out of their use of motor vehicles. Specifically, two groups, (1) persons convicted of drunk driving (a term we use to include driving under the influence of drugs) for their conduct at the time of the injuries and (2) uninsured motorists, are excluded from non-economic damages. A third group, felons committing or fleeing from crimes, is barred from all damages caused by the negligence of the other party. Responding to a constitutional

attack upon the measure, the San Francisco County Superior Court has issued an injunction preventing expenditure of state funds to implement the uninsured motorist portions of Proposition 213.

Charles Quackenbush, Insurance Commissioner of the State of California, Peter G. Stamison, Director of the Department of General Services, and Kathleen Connell, Controller of the State of California (referred to collectively as Quackenbush), ask us to vacate the superior court's injunction and to bar further proceedings in the underlying action. We grant the requested relief. We are persuaded by the Second District's analysis in *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, upholding the measure, which we supplement with our own analysis of issues not addressed in *Yoshioka*.

Facts and Procedural History

On November 5, 1996, the voters approved Proposition 213, The Personal Responsibility Act of 1996, adding sections 3333.3 and 3333.4 to the Civil Code,[1] to take

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[1] All statutory references are to the Civil Code. Oddly, section 3333.4 appears twice in the Civil Code, the Legislature having adopted a first section 3333.4, governing pipeline corporations and oil spills, during its 1995 legislative session. (Stats. 1995, ch. 979, § 2.) The full text of section 3333.3 and of the second section 3333.4 follows: Section 3333.3 states: "In any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony." Section 3333.4 states: "(a) Except as provided in subdivision (c), in any action to recover damages

effect January 1, 1997. Section 3333.3 bars a plaintiff from recovering any damages based on negligence of the defendant if plaintiff's injuries were "in any way proximately caused by the plaintiffs commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony."

Section 3333.4 covers both uninsured motorists and drunk drivers and addresses only noneconomic damages "to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary

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arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies: [¶] (1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense. [¶] (2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state. [¶] (3) The injured person was the operator of a vehicle involved in the accident and the operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state. [¶] (b) Except as provided in subdivision (c), an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a). [¶] (c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages."

damages." Persons convicted of drunk driving are barred from noneconomic damages for any injuries sustained at the time of the drunk driving, and insurers are not required to indemnify them for such losses. (See *id.*, subds. (a)(l), (b), (c).) Uninsured owners cannot recover or be indemnified for noneconomic damages except those caused by drunk drivers. (See *id.*, subds. (a)(2), (b), (c).) Uninsured drivers cannot recover or be indemnified for noneconomic damages in any circumstance. (See *id.*, subds. (a)(3), (b), (c).)

On December 17, 1996, the Congress of California Seniors, other consumer/taxpayer/citizen groups, and three individuals (referred to collectively as CCS) brought an action for an injunction and for declaratory relief. CCS alleged that Proposition 213 violated equal protection and due process under both the federal and California constitutions, burdened the right to travel, and denied the targeted drivers the First Amendment right to petition government for redress of grievances. CCS objected to retroactive application of Proposition 213 and also claimed it violated California's "one subject" restriction on initiative measures.

On March 5, 1997, Quackenbush, represented by the California Attorney General, demurred to the complaint and opposed issuance of a preliminary injunction.

On April 4, 1997, the superior court issued a preliminary injunction preventing the "defendants and their officers, agents, employees and all other persons acting on their behalf from any expenditure of State funds or resources for the purposes of implementing" the sections denying noneconomic recovery to uninsured owners and

drivers and excusing insurers from indemnifying drunk drivers and most uninsured motorists for noneconomic damages.[2] The court also overruled Quackenbush's demurrer.

This petition and a related petition for writ of supersedeas, to stay the injunction pending appeal, followed. In that separate proceeding, we denied the supersedeas petition.[3] On July 11, 1997, we issued an alternative writ in this matter, interpreting Quackenbush's petition as seeking to overturn both the preliminary injunction and the order overruling his demurrer. We have permitted the Association of California Insurance Companies and other concerned insurance organizations to appear as amici curiae, filing a single brief.

The Superior Court's Reasoning

The superior court found that CCS was likely to prevail in its equal protection attack upon three sections of the measure. The court explained that Proposition 213 treats felons more favorably than uninsured motorists, denying felons recovery only when their injuries are proximately caused by their felonies or flights therefrom, whereas uninsured motorists commit only infractions and are denied recovery even when their injuries do not relate to the infraction of failing to secure insurance. The court

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[2] The court left in effect the provisions barring felons and drunk drivers from recovering noneconomic damages and permitting uninsured owners to recover from drunk drivers.

[3] Action No. A078529, *Quackenbush v. Congress of California Seniors*, petition for writ of supersedeas, denied June 17, 1997.

noted a second inequity, that drunk drivers and fleeing felons are denied recovery only if they are convicted and that they can obtain compensation if they are not prosecuted or convicted or if they are permitted to plead guilty to misdemeanors. Uninsured motorists have no such escape hatches.

The court's third example of unfairness focused on the difference between subdivision (a)(2), covering uninsured owners (who are not always drivers), and subdivision (a)(3), governing uninsured drivers (who are not always owners). Because of the wording of subdivision (c), an owner may obtain damages from a drunk driver whereas a driver who is not an owner may not. The court suspected a possible drafting oversight, but determined that the distinction had no rational basis and denied equal protection to the uninsured driver of a borrowed car.

Contentions

Quackenbush contends that, as economic legislation, Proposition 213 is presumed to be constitutional and must be upheld because its provisions are rationally related to legitimate state interests. He argues that the classifications in economic legislation need not be perfect if the legislation is a rational means for promoting the state's interests, which he contends it is. Quackenbush insists that Proposition 213 does not establish any unlawful classification based upon wealth, race or ethnicity or impermissibly discriminate against any class of tort victims. He also anticipates and addresses the other arguments presented below by CCS.

CCS, without requesting judicial notice of matters outside the record of the lower court proceedings, describes heart-rending circumstances of particular plaintiffs whose cases might be affected by Proposition 213. Before acknowledging CCS's appropriate legal arguments, we emphasize that it is not our role to second-guess the electorate's decision that the benefits to the state outweigh hardships to individual plaintiffs adversely affected by the measure. Likewise, we do not evaluate CCS's claim that Proposition 213 will not deter motorists from driving without insurance, an assertion which challenges the electorate's judgment and was not subject to empirical proof before the measure went into effect.

Stripped of the sometimes hyperbolic rhetoric, CCS's constitutional arguments reduce to (1) supporting the superior court's determination that three classes of tort victims are treated unfavorably in ways that seem irrational and do not further the state's objectives, (2) contending that punishing uninsured motorists who are not at fault will not reduce insurance costs, (3) pointing to the unfairness of letting one who is at fault and uninsured benefit from an innocent driver's failure to procure insurance, (4) mentioning other unfair distinctions, such as between tortfeasors who recklessly or intentionally injure uninsured motorists (immune) and those who injure fleeing felons with the same intent (liable), and (5) restating due process, right to travel, and other arguments made to the superior court.

Amici curiae, taking a page from CCS's brief, describe to us the plight of certain citizens injured by uninsured motorists. We reiterate that our focus is on the

legality of the measure, not its wisdom, a point amici acknowledge later in their brief.

Amici highlight a circumstance mentioned by the parties several times in passing and lightly noted by the superior court: Motorists are required by California law to obtain and carry proof of insurance or some other form of financial responsibility and to supply such proof when applying for vehicle registration. Amici suggest that reducing tort recoveries is an appropriate extra penalty for breaking these laws. Amici assert that Proposition 213 will reduce the cost of insurance and will benefit uninsured motorists by making insurance more affordable to them as well as to those presently insured. Amici remind Proposition 213's critics that the measure preserves economic damages for uninsured motorists and that noneconomic damages do not nullify pain and suffering, they only imperfectly compensate injured persons for it.[4]

Yoshioka

During the pendency of this proceeding, Division Seven of the Second District decided *Yoshioka v. Superior Court, supra,* 58 Cal.App.4th 972 (*Yoshioka*), upholding Proposition 213 against several of the claims presented here. We have examined *Yoshioka,* and conclude that its decision on prospective application of the measure is sound. We reject other arguments not discussed by the *Yoshioka* court. We do not address the retroactivity issue

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[4] Amici and CCS also debate whether poor people are more likely than others to be uninsured, an inquiry of limited relevance.

because we find CCS lacks to [sic] requisite standing to raise it. We issue a peremptory writ of mandate to compel the superior court to vacate its injunction and to sustain Quackenbush's demurrer to CCS's action.

David Yoshioka was an uninsured motorist injured in an automobile accident before Proposition 213's effective date. He claimed the defendants' car rear-ended his, causing serious injuries. His case was set for trial after Proposition 213's effective date and the superior court ruled, *in limine*, that Yoskioka could not present proof of noneconomic damages. Yoshioka filed a writ petition claiming that either retroactive or prospective application of Proposition 213 would violate due process and equal protection. The appellate court disagreed with each of Yoshioka's arguments. (*Yoshioka, supra*, 58 Cal.App.4th at pp. 979-992.)

Reading the text of the initiative and noting the way it was presented in the ballot pamphlet, *Yoshioka* concluded that the voters intended retroactive application. The court then decided that retroactive application did not violate due process or equal protection, effectuated the purposes of the measure, and did not punish actions taken in reasonable reliance upon former law because drivers were required to purchase insurance long before Proposition 213 was adopted. (*Yoshioka, supra*, 58 Cal.App.4th at pp. 982-989.)

The court next addressed due process and equal protection barriers to prospective operation of Proposition 213. According to *Yoshioka*, the measure does not violate due process because applicability does not depend on a factual inquiry requiring a hearing. "Drivers either

possess insurance or they don't. If they don't and they choose to drive (instead of using other alternative modes of transportation like public transit), we can think of no justifiable defense that would require a hearing." (*Yoshioka, supra,* 58 Cal.App.4th at p. 989.)

Addressing equal protection, *Yoshioka* noted Proposition 213's legitimate purposes of restoring balance to the justice system and reducing costs of mandatory automobile insurance. The court then concluded that eliminating noneconomic damages for uninsured motorists was rationally related to both interests because it would lead to reduced costs for insurance and to fewer lawsuits. "Further, as Proposition 213 encourages more uninsured drivers to buy auto insurance, tax-paying and law abiding citizens will no longer be required to carry the burden of paying for those citizens that choose to directly defy the current state of the law. It was rational for the electorate to believe that a classification that eliminates the uninsured would achieve a legitimate interest in restoring balance to our justice system." (*Yoshioka, supra,* 58 Cal.App.4th at p. 991.)

Finally, *Yoshioka* concluded that Proposition 213 did not violate the "one subject" rule. Its subject was limiting recovery of noneconomic damages for drivers who break the law, a subject it addressed in three integrated parts, covering uninsured motorists, felons and drunk drivers. (*Yoshioka, supra,* 58 Cal.App.4th at p. 993).[5]

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[5] A dissenting justice disagreed with the majority on retroactivity and did not address the other issues. (*Yoshioka, supra,* 58 Cal.App.4th at pp. 993-1001 (dis opn. of Johnson, J.).)

We agree with *Yoshioka*'s conclusions on due process, equal protection and the "one subject" issue. We express no opinion on retroactivity, which is not properly before this court.

Although Quackenbush, CCS and amici have addressed retroactivity, we conclude that these consumer/taxpayer/citizens lack standing to raise the retroactivity question. Unlike the prospective operation of Proposition 213, which will affect nearly all California adults and many other Californians, the retroactivity question affects primarily those uninsured plaintiffs who expect to bring pre-Proposition 213 cases to trial and those defendants who may object to evidence of non-economic damages. Retroactivity, if imposed by Proposition 213, will have only a limited effect on this defined group of people for a relatively short period of time. It will have very little impact on taxpayers and insurance policy holders or on the general citizenry. (*Fiske v. Gillespie* (1988) 200 Cal.App.3d 1243, 1245-1246.)

An individual plaintiff like Yoshioka, facing the prospect of retroactive application of the statute, has a strong interest in defeating retroactivity and has the requisite standing. The consumer/taxpayer/citizens involved here are only slightly and academically concerned with the retroactivity issue.[6] Indeed, the weakness of CCS's interest in the retroactivity question is reflected in its prayer

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[6] Certain attorneys who are members of Consumer Attorneys of California may be somewhat more interested in the retroactivity question because they have clients whose cases may be affected. However, these attorneys have a better forum for raising the retroactivity issue.

for relief below. CCS sought a declaration that the uninsured motorist sections were invalid and an injunction against expending any resources to implement them. CCS made no alternative request to enjoin either retroactive application of the sections or spending money to implement them retroactively. If CCS's challenge to prospective application of the statute is to terminate, as we conclude it must, we believe the retroactivity issue must expire with it.

Issues not Addressed by *Yoshioka*

CCS has raised several arguments not answered by *Yoshioka*. We address them here.

Anomalies in the Statutes

CCS levels legitimate criticism against Proposition 213's disparate treatment of different classes of motorists. Why, for example, should an uninsured owner be permitted to recover noneconomic damages from a drunk driver while an uninsured driver who is not an owner may not? And why must a drunk driver have been convicted in order for the uninsured driver to recover? Doesn't this disfavor an uninsured owner in the situation where an obviously drunk driver dies from injuries sustained in the crash? Should felons committing or fleeing crimes and drunk drivers be excused from any Proposition 213 penalties if they avoid convictions while uninsured motorists have no comparable leeway? Should tortfeasors (insured or not) who injure uninsured motorists, even recklessly or intentionally, be immune from noneconomic damages while tortfeasors who injure felons are immune only from

damages caused by negligence? Should an uninsured owner be denied noneconomic damages when injured by a felon committing any crime other than drunk driving, no matter how serious the felony? CCS contends none of these anomalous distinctions furthers a legitimate state purpose; instead, they all demonstrate the irrationality of the statutory scheme.

Only the "rational basis" test must be met when reviewing legislative classifications among personal injury plaintiffs (*Young v. Haines* (1986) 41 Cal.3d 883, 899 (*Young*).) When one class is treated differently from another, there must be "some rationality in the nature of the class singled out" (*Brown v. Merlo* (1973) 8 Cal.3d 855, 861, quoting from *Rinaldi v. Yeager* (1966) 384 U.S. 305, 308-309) and a "rational relationship between the legislative goal and the class singled out for unfavorable treatment" (*Young, supra,* 41 Cal.3d at p. 900).

Proposition 213's primary classification was a division between the group of people who obey the law by purchasing automobile insurance, driving sober, and committing no vehicle-related felonies and the group of people who violate these driving-related laws and are disfavored because of their violations. CCS cannot reasonably argue that, when allocating the pool of insurance proceeds among members of these two groups, it is unfair or irrational to favor the law-abiding group or that it is irrational for the first group to be relieved of the obligation to pay insurance rates determined in part by

the need to pay noneconomic damages (and in the case of felons all damages) to the second group.[7]

Instead of focusing upon Proposition 213's primary classification, the superior court directed its attention to perceived inequities in Proposition 213's secondary classification scheme, an easier target. CCS now directs considerable attention to the differences in treatment between uninsured owners and drivers, the perceived advantages for felons and drunk drivers who avoid conviction, and the prospect that an innocent uninsured motorist would be unable to recover from a wealthy uninsured tortfeasor. CCS suggests that each of these distinctions or anomalies must be shown to be rationally related to the primary purposes of Proposition 213.

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[7] CCS does assert that Proposition 213 will not cause uninsured motorists to buy insurance, that "balance" in the justice system cannot be attained by an improper singling out of one group, and that lower insurance rates could as easily be achieved by denying compensation to some other group of injured motorists. CCS also contends that the uninsured are improperly singled out because they are an "unpopular group." CCS describes uninsured motorists who are accident victims as "innocent" and suggests that insured tortfeasors are less deserving of legislative support than their victims. It is clear, however, that Proposition 213 targeted uninsured motorists because of the group's conduct, receiving the benefits of the insurance system without paying its admission price. The vote for Proposition 213 reflected disagreement with that conduct, not disapproval of a group of persons. The voters concluded that driving without insurance was not "innocent" and they impliedly tolerated negligent operation by motorists who purchased insurance to protect themselves from the financial consequences of their negligence. Neither legislative judgment was unreasonable.

We disagree. The secondary classification scheme addressed secondary objectives, balancing rights among members of the disfavored groups and facilitating determining which persons would be included in the disfavored groups. It reasonably accomplished these objectives and did not interfere with accomplishment of the primary objectives of the legislation. It was required to do no more.

Instead of creating its own definition of a felon or a drunk driver and requiring a separate determination of guilt during the personal injury case, Proposition 213 reasonably premised membership in each group upon a criminal conviction. Proposition 213 apparently sought to favor uninsured motorists over felons and drunk drivers, a rational objective. It accomplished this in part (uninsured owners recover from drunk drivers, felons are denied all damages) but favored the latter groups in other ways (uninsured drivers who are not owners cannot recover from drunk drivers, felons and drunk drivers are exempted if not convicted). The measure is not rendered invalid because it imperfectly accomplished its secondary goals.

CCS's critique of the secondary classification scheme suggest ways to improve Proposition 213, such as by equalizing the treatment of uninsured owners and uninsured drivers, by allowing uninsured victims to recover directly from wealthy uninsured tortfeasors, and by permitting recovery against drunk drivers or felons without requiring conviction for those offenses. However, improving Proposition 213 is a legislative task, not one to be performed by the judiciary.

Failure to Provide Procedures for Presenting Explanations or Excuses

CCS describes Proposition 213 as an automatic forfeiture procedure which violates due process because it gives the plaintiff no opportunity to explain lack of insurance. CCS suggests that plaintiffs should be permitted to show why they are uninsured, whether they could not find affordable insurance and whether they mistakenly believed that coverage existed. CCS objects to this novel and severe penalty for being uninsured. CCS cites *Bennett v. Bodily* (1989) 211 Cal.App.3d 133 (*Bennett*), for support of the claim a hearing of some kind is required.

In *Bennett*, an uninsured motorist obtained an arbitration award for $13,500 against Bodily, based upon Bodily's fault in an accident. Without Bennett's participation, Bodily then recovered $15,000 from his carrier under his uninsured motorist coverage. Acting under compulsion of Vehicle Code section 17200, the superior court nullified Bennett's arbitration award by subtracting Bodily's larger insurance recovery from it. The *Bennett* court found this confiscation without a hearing to be unconstitutional (*Bennett, supra,* 211 Cal.App.3d at p. 135.)

The key to *Bennett's* due process ruling was Vehicle Code section 17200's attempt to override Bennett's right to contest Bodily's uninsured motorist recovery which, by statute, would take place only if Bennett were liable for damages. (*Bennett, supra,* 211 Cal.App.3d at p. 142.)

Unlike the statute in *Bennett*, Proposition 213 does not cause a forfeiture without providing an opportunity

to contest the conditions leading to loss. Under Proposition 213, proof of insurance or financial responsibility is the determinative factor for recovering noneconomic damages. Although the statutes do not establish procedures for making this determination, courts may use their normal *in limine* or trial procedures to resolve the question for individual plaintiffs. An injured plaintiff will have a forum for proving compliance with financial responsibility laws and avoiding Proposition 213.[8]

Denial of Reasonable Access to the Courts

CCS raises the practical problem that plaintiffs affected by Proposition 213 will be unable to hire attorneys because attorneys' contingency fees normally are paid from noneconomic damages, not money used to reimburse plaintiffs' out-of-pocket losses. CCS contends uninsured drivers will be discriminated against in their access to courts based on economic situation, race and ethnicity.

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[8] The statutes mention no potential excuses for driving without insurance. Therefore proceedings to determine whether an individual plaintiff can afford insurance or whether affordable insurance is reasonably available are not required. Because the issue is not before us, we do not decide whether a plaintiff could employ a "de facto" insured theory to prove he or she reasonably believed insurance coverage existed. We make no comment on whether an inadvertently and unexpectedly uninsured plaintiff may avoid the restrictions of Proposition 213, other than to express extreme skepticism about *Yoshioka's* suggestion that a mere attempt to buy insurance, "good faith or otherwise," (*Yoshioka, supra,* 58 Cal.App.4th at p. 991) (whatever that means) would prevent the penalty.

No extended analysis is required here. CCS's attorneys' fees argument implies that the present system for hiring and paying attorneys is sacrosanct and may not be disturbed. It assumes that uninsured litigants and attorneys will be unable to find other ways to structure their relationships. At most, CCS casts doubt on the wisdom of the measure, not its constitutionality.

The same can be said about the argument that Proposition 213 discriminatorily bases court access upon economic situation, race and ethnicity. The measure does not require a litigant to purchase insurance before coming to court. It only reinforces California's determination that paying the price for insurance is as much a part of owning and driving a car as are purchasing and registering the car and buying gasoline.[9]

Denial of the Right to Travel

Noting that realistic alternatives to automobile travel do not exist in some parts of California, CCS contends uninsured motorists are denied their right to travel by Proposition 213. Although CCS does not develop this claim here, it seeks to preserve the opportunity to do so at trial. CCS also suggests that Proposition 213 may chill entry into California by insured motorists from other states who might be considered uninsured drivers under Proposition 213.

---

[9] CCS's implication that forgoing driving is not an option for many poor families who cannot afford insurance indicts the geographic and economic structure of society, neither of which can excuse compliance with the law.

"Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized as a fundamental aspect of the federal union of states. . . . [¶] The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution. [Citation.] . . . [¶] Neither the United States Supreme Court nor [the California Supreme Court] has ever held, however, that the incidental impact on travel of a law having a purpose other than restriction of the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally impermissible. . . . [¶] Moreover, lest we be understood to imply that an as applied challenge to [an] ordinance might succeed on the right to travel ground alone, we caution that, with few exceptions, the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy the right." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1096-1103.)

Government is permitted to regulate the conditions of travel by requiring drivers' licenses, registrations, and compliance with a myriad of traffic laws. It may impose gasoline taxes, trucking regulations and agricultural inspection even when they inhibit travel. The insurance requirement and related penalties, including Proposition 213's restriction on recovery by uninsured motorists, are no more onerous than these other travel regulations.

Increasing the Punishment for Driving Without Insurance

Responding to amici, CCS notes that the penalty for driving without insurance is $500 to $1,000 with a potential for a one year driver's license suspension. CCS contends that Proposition 213 may not add a penalty out of proportion to the offense and may not impose the new penalty on only those uninsured motorists who are injured in automobile accidents. CCS suggests that other classes of drivers, those who habitually speed, those whose cars are unsafe, those who refuse to wear seat belts, should be included in any measure designed to reduce insurance costs. CCS also notes that Proposition 213 may provide a windfall for manufacturers of defective vehicles and products, with no accompanying savings for those who purchase automobile insurance.

These arguments are presented to support CCS's position that Proposition 213 is not rationally related to a legitimate state purpose. They present no viable constitutional law theories not addressed and rejected above. Proposition 213 is not rendered invalid because its restrictions do not extend to other drivers who disproportionately influence insurance costs or because nonmotorists may incidentally benefit from them.

Conclusion and Disposition

We have concluded that the superior court's reasons for enjoining expending money to implement Proposition 213 were legally incorrect. Anomalies in the treatment of persons in the three classes of disfavored motorists do not render the legislation invalid. We have also rejected

CCS's other challenges to prospective operation of the measure. We have determined that a retroactivity challenge must be made in a case where retroactive application is actually threatened. It follows that the superior court erred in issuing its injunction and in overruling Quackenbush's demurrer.

Let a peremptory writ of mandate issue compelling the San Francisco County Superior Court to vacate its injunction and its order overruling Quackenbush's demurrer and to enter a new order sustaining the demurrer without leave to amend. Costs in this proceeding are awarded to Quackenbush.

Phelan, P.J.

We concur:

Corrigan, J.

Parrilli, J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHARLES QUACKENBUSH, AS INSURANCE COMMISSIONER, etc., et al., Petitioners, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; CONGRESS OF CALIFORNIA SENIORS et al., Real Parties in Interest.	A078530 (San Francisco County Super. Ct. No. 983314) **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]** (Filed Jan. 23, 1998)

BY THE COURT:

It is ordered that the opinion filed herein on December 24, 1997, be modified in the following particular:

On page 5, in the first sentence of the second paragraph, delete the phrase "without requesting judicial notice of matters outside the record of the lower court proceedings" so the sentence reads:

> CCS describes heart-rending circumstances of particular plaintiffs whose cases might be affected by Proposition 213.

The petition for rehearing is denied. There is no change in the judgment.

Date: Jan. 23, 1996

PHELAN, J. P.J.

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHARLES QUACKENBUSH, AS INSURANCE COMMISSIONER, etc., et al., Petitioners, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent;	)	A078530 (San Francisco County Super. Ct. No. 983314)
CONGRESS OF CALIFORNIA SENIORS et al., Real Parties in Interest.	)	

PEREMPTORY WRIT OF MANDATE

(Filed Apr. 15, 1998)

The People of the State of California to the Superior Court of the State of California, County of San Francisco, Greetings:

The petition for a writ of mandate on file herein having been considered and this court having ordered that a peremptory writ of mandate issue,

WE DO COMMAND YOU, forthwith upon receipt of this writ, to vacate your injunction and your order overruling Quackenbush's demurrer and to enter a new order sustaining the demurer without leave to amend.

Witness the Honorable Michael J. Phelan, Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division *THREE*.

Attest my hand and the Seal of this Court this 9th day of April, 1998.

RON D. BARROW, Clerk

C. TURNER
C. Turner, Deputy Clerk

APPENDIX D

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHARLES QUACKENBUSH, AS INSURANCE COMMISSIONER, etc., et al., Petitioners, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; CONGRESS OF CALIFORNIA SENIORS et al., Real Parties in Interest.	A078306 (San Francisco County Super. Ct. No. 983314)

MEMORANDUM OPINION[1]

(Filed Feb. 10, 1998)

On December 24, 1997, this court filed its opinion in response to an original writ petition filed by appellant herein. (See *Quackenbush v. Superior Court* (1997) 60

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[1] Section 6 of the Standards of Judicial Administration provides: "The Courts of Appeal should dispose of causes that raise no substantial issues of law or fact by memorandum or other abbreviated form of opinion."

Cal.App.4th 454.) In that opinion we decided the identical issues presented by appellant in this appeal. That decision is now final as to this court (although a petition for review is pending). Accordingly, there is no justiciable issue to be decided and this appeal is moot.

The appeal is dismissed.

/s/ _____
Phelan, P.J.

We concur:

/s/ _____
Corrigan, J.

/s/ _____
Parrilli, J.

APPENDIX E

First Appellate District, Division Three, No. A078530
S067731

IN THE SUPREME COURT OF CALIFORNIA

CHARLES QUACKENBUSH AS INSURANCE COMMISSIONER Et Al., Petitioners

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent.
CONGRESS OF CALIFORNIA SENIORS Et Al., Real Parties In Interest

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(Filed Mar. 25, 1998)

Petition for review DENIED.

Mosk, J. is of the opinion the petition should be granted.

The request for an order directing depublication of the opinion is denied.

George
Chief Justice

APPENDIX F

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER EIGHT

CONGRESS OF CALIFORNIA SENIORS, et al., Plaintiffs, vs. CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, et al., Defendants.	NO. 983 314 **ORDER GRANTING PRELIMINARY INJUNCTION** (Filed Apr. 4, 1997)

On March 20, 1997, there was a hearing on plaintiffs' Motion for Preliminary Injunction, the Honorable William Cahill, presiding. After reviewing the file in this matter, as well as all evidence presented and considering oral argument, the court makes the following order:

IT IS HEREBY ORDERED THAT:

Plaintiffs' motion for a preliminary injunction is GRANTED. A preliminary injunction shall issue enjoining defendants and their officers, agents, employees and all other persons acting on their behalf from any expenditure of State funds or resources for the purpose of implementing Civil Code Sec. 3333.4(a)(2), Sec. 3333.4(a)(3) and Sec. 3333.4(b), (hereinafter "statutes"), all of which were enacted by the passage of Proposition 213 in November,

1996, and all of which limit damage recoveries for uninsured motorists in California.[1]

This court finds that there is a likelihood that plaintiffs will prevail on the merits at trial and that these three sections of Proposition 213 will be held unconstitutional as violative of the Equal Protection Clauses of both the United States and the California Constitutions. In addition, this court finds that plaintiffs will suffer undue hardship and irreparable harm without this injunction and that the burden on defendants will be insignificant in comparison.

Without discussing all of the arguments presented by counsel, this court provides three obvious examples of Proposition 213's unconstitutionality under the Equal Protection Clauses of the State and Federal Constitutions. First, felons are denied pain and suffering damages only if their injuries were "proximately" caused by their felony or immediate flight. (Civ. Code Sec. 3333.3.) Uninsured motorists, who are not committing any felony[2], are completely prohibited from recovering those same damages, even if their infraction is completely unrelated, much less a "proximate" cause of their injuries. Proposition 213's provisions giving more rights to fleeing felons than to innocent uninsured motorists arbitrarily distinguishes between these two groups of citizens and serves

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[1] The remaining provisions of Proposition 213 are unaffected by this preliminary injunction.

[2] Driving without insurance is an infraction.

no legitimate state purpose, and is therefore unconstitutional as a violation of the Equal Protection rights available to all citizens. (*McLaughlin v. Florida* (1964) 379 U.S. 184, *Brown v. Merlo* (1973) 8 Cal.3d 855.)

A second example of Equal Protection problems in Proposition 213 is found in the provisions that prohibit drunk drivers and fleeing felons from recovering their pain and suffering damages, but only after they are convicted. (Civ. Code Sec. 3333.4(a)(1).) These same persons can obtain compensation, however, if they are allowed to plead guilty to a misdemeanor instead of a felony, are not prosecuted or are not convicted at trial due to any legal "technicality." No such option is available to an uninsured motorist. Their situation is similar to liability under "strict liability" law: no matter what the reason, no matter how innocent or inadvertent their failure to have insurance is, their class of citizens can **never** recover for pain and suffering. This distinction is irrational and arbitrary, serves no state purpose and is therefore unconstitutional.

The third example is the provision of Proposition 213 which permits an uninsured automobile **owner**, who normally cannot get pain and suffering damages in any accident, to obtain those damages when he is injured by a convicted drunk driver or felon. That uninsured owner can recover all pain and suffering damages, if the tortfeasor is convicted. (Civ. Code Sec. 3333.4(c).) That distinction, by itself, is probably arbitrary and without

rational basis[3], but there is no similar exception for an uninsured **driver** who is involved in an accident while driving another person's car. The uninsured **driver** of a borrowed car who is injured by a drunk driver can obtain no compensation for his pain and suffering simply because on that particular day he or she was driving a borrowed car and not his or her own vehicle. The accident is the same, the injuries are the same, but the person's compensation for those injuries depends solely on the random circumstances of driving someone else's car rather than one owned by the driver. This outcome was probably an oversight by the drafters of Proposition 213, but is still arbitrary, without rational basis and violates the Equal Protection Clauses of the Federal and State Constitutions.

In response to plaintiffs' arguments, defendants argue that Proposition 213 accomplishes the following three legislative purposes and.therefore is constitutional:

1. Proposition 213 combats "skyrocketing" insurance costs;

2. Proposition 213 furthers the objectives of California's financial responsibility laws;

3. Proposition 213 restores balance to our justice system by limiting the right to sue of criminals, drunk drivers and uninsured motorists. (Defendants Opposition, p.6.)

---

[3] Why should a person's legal ability to be compensated for pain and suffering injuries depend solely on the criminal intent or blood alcohol level of a person with whom he randomly and unfortunately has a traffic accident?

Defendants have presented practically no arguments in support of the "balance to our justice system" argument nor have they put forth any persuasive argument to support the "financial responsibility law" position. There is, however, much discussion by defendants about lowering insurance costs for California citizens and insurance companies. Most of these arguments seek to draw parallels between Proposition 213 and the cases upholding the MICRA damage caps for victims of medical malpractice. (MICRA is the Medical Injury Compensation Reform Act of 1975.)

The first problem with this argument is that the MICRA caps apply to all citizens of California, not just a subset of citizens and certainly not groups defined arbitrarily, as the above examples show. The California Supreme Court found the legislative reasons for the MICRA limits to be rational and well thought out. (See, e.g., *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137). Proposition 213 is so different from the legislatively enacted MICRA limits that the case law cited is simply irrelevant to any evaluation of the constitutionality of the uninsured motorist damage limitations passed in November 1996.

Unfortunately, there are several other constitutional infirmities regarding the uninsured motorist provisions of Proposition 213 which were raised by the parties and are not discussed in this order.[4] However, this brief order

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[4] For example, Judge Stuart Pollak of the San Francisco Superior Court, on February 13, 1997, issued a ruling finding that the retroactive application provisions concerning uninsured motorists under Proposition 213, (Civil Code Sec.

outlines more than sufficient reasons for issuance of this preliminary injunction. Of course, nothing is [sic] this order is intended to restrict any party's rights to raise further arguments, at trial or at further hearings in this case, both for and against the uninsured motorist portions of Proposition 213.

PRELIMINARY INJUNCTION IS GRANTED. Plaintiffs have established that they have a likelihood of success at trial to have the uninsured motorist provisions of Proposition 213 found unconstitutional both under the United States and the California Constitutions and that plaintiffs would suffer irreparable harm if this preliminary injunction is not issued.

Defendants are ordered and enjoined from any expenditure of State funds or resources for the purpose of implementing Civil Code sections 3333.4(a)(2), 3333.4(a)(3) and 3333.4(b), enacted through Proposition 213.

DATED: April 4, 1997

/s/ William Cahill
WILLIAM CAHILL
JUDGE OF THE SUPERIOR COURT

Case No. 983314

3333.4), to be unconstitutional. This court agrees with Judge Pollak's order in *Castillo v. Espinoza*, San Francisco Superior Court Case No. 962400, and would also find these retroactive provisions to be unconstitutional on the arguments presented by plaintiffs in the instant case.

APPENDIX G

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Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

Congress of California Seniors, et al., Plaintiffs, v. Chuck Quackenbush, Insurance Commissioner of the State of California, et al., Defendants.	CASE NO. 983514 **ORDER OVERRULING STATE DEFENDANTS' DEMURRUR TO PLAINTIFFS' COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF** (Filed Apr. 18, 1997)

The demurrer of State Defendants Chuck Quackenbush, Insurance Commissioner; Peter G. Stamison, Director of the Department of General Services; and Kathleen

Connell, State Controller to Plaintiffs' Congress of California Seniors, Utility Consumer Action Network, Proposition 103 Enforcement Project. Southern California Organizing Committee, Consumer Attorneys of California, Latino Issues Forum, The Greenlining Institute, Howard Owens, Ina De Long, and David S. Casey, Jr., Complaint for Injunctive and Declaratory Relief, came on regularly for hearing by the court on March 20, 1997, before the Honorable William Cahill. Robin Johansen and Katherine Purcell appeared as counsel for plaintiffs and Leslie Lopez and Shelleyanne Chang, Deputy Attorneys General appeared as counsel for state defendants.

After hearing, the matter was submitted to the court for a ruling. The court, having read and considered the supporting and opposing points and authorities and having heard and considered the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that state defendants' demurrer is overruled.

Dated: 4/18/97

/s/ William Cahill
WILLIAM CAHILL
Judge of the Superior Court

APPENDIX H

RULE 14(1)(g)(i) SUMMARY OF PRESENTATION AND REVIEW OF FEDERAL QUESTIONS

Complaint of Congress of California Seniors, et al., for Injunctive and Declaratory Relief, Superior Court for the City and County of San Francisco (December 17, 1996):

> Civil Code sections 3333.4(a)(2), 3333.4(a)(3), 3333.4(b) and 3333.4(c) on their face and as applied violate the equal protection provisions of the 14th Amendment of the United States Constitution. . . .
>
> (First Cause of Action, ¶ 19.)
>
> Civil Code sections 3333.4(a)(2), 3333.4(a)(3), 3333.4(b) and 3333.4(c), on their face and as applied violate the due process provisions of the Fourteenth Amendment to the United States Constitution. . . .
>
> (Second Cause of Action, ¶ 30.)

Order Granting Preliminary Injunction, Superior Court for the City and County of San Francisco (April 4, 1997):

> This Court finds that there is a likelihood that plaintiffs will prevail on the merits at trial and that these three sections of Proposition 213 will be held unconstitutional as violative of the Equal Protection Clauses of both the United States and the California Constitutions.
>
> (App. 30.)
>
> Unfortunately, there are several other constitutional infirmities regarding the uninsured motorist provisions of Proposition 213 which

> were raised by the parties and are not discussed in this order [fn. omitted].
>
> (App. 33.)

Return of Real Parties in Interest Congress of California Seniors, et al., to Petition for Writ of Mandate, Court of Appeal of the State of California, First Appellate District, Division Three (August 1, 1997):

> PROPOSITION 213 VIOLATES THE EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.
>
> (Return, p. 18.)
>
> Proposition 213 Violates the Due Process Clauses of the State and Federal Constitutions.
>
> (Return, p. 48.)

Opinion of the Court of Appeal of the State of California, First Appellate District, Division Three (December 24, 1997):

> We agree with *Yoshioka's* conclusions on due process, equal protection and the "one subject" issue.
>
> (App. 11.)
>
> The measure is not rendered invalid because it imperfectly accomplished its secondary goals.
>
> (App. 15.)

Petition of Congress of California Seniors, et al., for Rehearing, Court of Appeal of the State of California, First Appellate District, Division Three (January 8, 1998):

> The Complaint Alleges an Equal Protection Challenge to Proposition 213 as Applied to

Racial and Ethnic Minorities and to the Poor and Indigent.

(Pet. for Rhrg., p. 2.)

Order of the Court of Appeal of the State of California, First Appellate District, Division Three, denying Petition of Congress of California Seniors, et al., for Rehearing (January 23, 1998).

(App. 22-23.)

Petition of Congress of California Seniors, et al., for Review, California Supreme Court (February 2, 1998):

Proposition 213 Arbitrarily Classifies Motorists in Violation of Their Equal Protection and Due Process Rights.

(Pet. for Rev., p. 11.)

Order of the California Supreme Court denying Petition of Congress of California Seniors, et al., for Review (March 25 1998.)

(App. 28.)

APPENDIX I

UNITED STATES CONSTITUTION

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

CALIFORNIA CIVIL CODE

§ 3333.4. Operation or use of motor vehicles; noneconomic losses; limitation

(a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary damages if any of the following applies:

(1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense.

(2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.

(3) The injured person was the operator of a vehicle involved in the accident and the operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state.

(b) Except as provided in subdivision (c), an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a).

(c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time

of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpenuciary damages.

(Added by Initiative Measure (Prop. 213, § 3, approved Nov. 5, 1996, eff. Nov. 5, 1996).)

APPENDIX K

PROPOSITION 213 BALLOT MATERIALS
(NOVEMBER 5, 1996 GENERAL ELECTION)

Official Title and Summary Prepared by the Attorney General

LIMITATION ON RECOVERY TO FELONS, UNINSURED MOTORISTS, DRUNK DRIVERS. INITIATIVE STATUTE.

- Denies all recovery of damages to a convicted felon whose injuries were proximately caused during the commission of the felony or immediate flight therefrom.
- Denies recovery for noneconomic damages (e.g., pain, suffering, disfigurement) to drunk drivers, if subsequently convicted, and to uninsured motorists who were injured while operating a vehicle.
- Provides exception when an uninsured motorist is injured by a subsequently convicted drunk driver. With this one exception, provides that insurer is not liable for noneconomic damages.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Probably minor annual savings in state and local government court-related costs.
- Reduction in insurance tax revenue to the state of probably less than $5 million annually.

Analysis by the Legislative Analyst

PROPOSAL

This measure would limit the ability of certain people to sue to recover losses suffered in accidents.

Limits on Uninsured Motorists and Drunk Drivers

Under existing law, someone who has suffered an injury in a car accident may sue the person, business, or government at fault for the injury in order to recover related losses. These losses can include both *economic* losses (such as lost wages, medical expenses, and property damage) and *noneconomic* losses (such as pain and suffering).

This measure would prohibit the recovery of *noneconomic* losses in certain car accidents. Specifically, an uninsured driver or a driver subsequently convicted of driving under the influence of alcohol or drugs ("drunk drivers") at the time of an accident could not sue someone at fault for the accident for noneconomic losses. (These drivers could still sue for economic losses.) If, however, an uninsured motorist is injured by a drunk driver in an accident, the uninsured motorist could still sue to recover noneconomic losses from the drunk driver.

Limits on Convicted Felons

Currently, in certain cases a person who is injured while breaking the law may sue on the basis of another person's negligence to recover any losses resulting from the injury. For example, a person convicted of a robbery who was injured because he or she slipped and fell while

fleeing the scene of the crime can sue to recover losses resulting from the injury.

This measure prohibits a person convicted of a felony from suing to recover any losses suffered while committing the crime or fleeing from the crime scene *if* these losses resulted from another person's negligence. Convicted felons, however, would still be able to sue to recover losses for some injuries suffered while committing or fleeing a crime – for instance those resulting from the use of "excessive force" during an arrest.

FISCAL EFFECT

Restricting the ability of people to sue for injury losses in the above situations would reduce the number of lawsuits handled by the courts. This would reduce annual court-related costs to state and local governments by an unknown but probably minor amount. These restrictions would also result in fewer lawsuits filed against state and local governments. Thus, there would be an unknown savings to state and local governments as a result of avoiding these lawsuits.

In addition, the restrictions placed on uninsured motorists and drunk drivers could result in somewhat lower costs, or "premiums," for auto insurance. Under current law, insurance companies doing business in California pay a tax of 2.35 percent of "gross premiums." This tax is called the gross premiums tax and its revenues are deposited in the state's General Fund. Any reduction in insurance premiums would also reduce gross premiums tax revenue to the state. We estimate that any revenue loss would probably be less than $5 million annually.

Argument in Favor of Proposition 213

PROPOSITION 213 WILL FIX A SYSTEM THAT REWARDS PEOPLE WHO BREAK THE LAW.

It's *AGAINST THE LAW TO DRIVE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS* In California. In most cases it's also against the law to drive without insurance. Unfortunately, thousands of people *ignore these laws and get rewarded for it.* Drunk drivers and uninsured motorists can sue law-abiding citizens for huge monetary awards in addition to being compensated for medical and other expenses.

These huge awards cost Californians who play by the rules and obey the law $327 million every year! That's not fair!

Proposition 213 will prevent drunk drivers, convicted felons and uninsured motorists from collecting these huge monetary awards, while still protecting their right to be compensated for medical and out-of-pocket expenses. That *is* fair.

Further, if Proposition 213 becomes law, convicted felons would be prohibited from collecting any damages if they're accidentally injured while fleeing from their crime.

PROPOSITION 213 SAYS PEOPLE WHO BREAK THE LAW SHOULD NOT BE REWARDED, WHILE LAW ABIDING CITIZENS PICK UP THE TAB.

Law-abiding citizens already pay higher insurance premiums to cover uninsured motorists. Law-abiding citizens should *not* be punished for living responsibly! *The system needs to be fixed. Illegal behavior shouldn't be*

rewarded. People who break the law must be held accountable for their actions.

PROPOSITION 213 SAYS DRUNK DRIVERS WHO INJURE AND EVEN KILL PEOPLE SHOULD NOT BE REWARDED.

Drunk drivers in California cost all of us in terms of lost lives, serious injuries to family members and friends and higher insurance premiums.

- In 1994, 1,488 people were killed in crashes caused by drunk drivers.
- 39,437 people were injured in collisions involving drunk drivers during 1994.
- These victims and their families shouldn't be forced to suffer a second time through huge lawsuits.
- Proposition 213 will stop drunk drivers from being rewarded for breaking the law.

PROPOSITION 213 SAYS CONVICTED FELONS SHOULD NOT BE ALLOWED TO PROFIT FROM THEIR CRIMES.

- *Proposition 213 takes the "profit" out of crime by* closing a legal loophole that allows convicted felons to sue law-abiding citizens, businesses and governments to pay for "accidental injuries" incurred while running from their crime.

PROPOSITION 213 SAYS NO TO UNINSURED DRIVERS BY SAYING NO TO HUGE MONETARY AWARDS FOR "PAIN AND SUFFERING!"

- On average, nearly 30% of all drivers on the road in California are uninsured.
- In some parts of California, the percent of uninsured drivers is as high as 93%.
- Proposition 213 will stop uninsured motorists from being rewarded for breaking the law, while still covering medical and out-of-pocket expenses.

JOIN THE CALIFORNIA ASSOCIATION OF HIGHWAY PATROLMEN, DORIS TATE CRIME VICTIMS BUREAU, THE CALIFORNIA PEACE OFFICERS' ASSOCIATION, PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA, CALIFORNIA POLICE CHIEFS' ASSOCIATION, THE ASSOCIATION FOR CALIFORNIA TORT REFORM, AND MANY OTHERS WHO SUPPORT THE PERSONAL RESPONSIBILITY ACT OF 1996.

- *STOP LAWBREAKERS FROM PROFITING FROM THEIR CRIMES.*
- *VOTE YES FOR PERSONAL RESPONSIBILITY.*
- *VOTE YES ON PROPOSITION 213.*

LINDA OXENREIDER
California President, Mothers Against Drunk Driving (MADD)

CHUCK QUACKENBUSH
California Insurance Commissioner

D.O. "SPIKE" HELMICK
California Highway Patrol Commissioner

Rebuttal to Argument in Favor of Proposition 213

Political give and take.

Insurance companies gave over $1 million to Chuck Quackenbush's political campaign for Insurance Commissioner.

Now, Insurance Commissioner Chuck Quackenbush's initiative allows insurance companies to take $327 million more every year out of our pockets.

Here is a partial list of the political money Chuck Quackenbush has taken from the Insurance Lobby for his Insurance Commissioner campaign:

Association of California Insurance Companies	$335,500
CA Casualty Management	$75,000
Zenith Insurance Co.	$63,000
CA Life Underwriters PAC	$50,100
TIG Insurance	$52,500
Alfa Mutual Insurance	$40,000
Arrowhead General Insurance Agency	$30,000
Surety Company of the Pacific	$28,000
Fremont Compensation Insurance	$65,500
Liberty Mutual	$25,000
Pacific Employers Insurance	$25,000
California Casualty Indemnity Exchange	$25,000
Zenith-Calfarm Inc.	$25,000
Kramer-Wilson Company Insurance	$17,500
Farmers Insurance Group of Companies	$18,950
Western Pioneer Insurance	$13,500
Fireman's Fund Insurance	$12,500
National Insurance Group	$10,500
Argonant Insurance	$10,000
Progressive Casualty	$11,000
Transamerica	$20,000

Farmers Group Inc.	$9,000
CA Indemnity Insurance	$9,500
Government Employees Insurance Company	$11,500
The Pacific Rim Assurance	$8,500
Travelers PAC	$8,500
Insco Insurance Services	$25,000
CNA Financial	$7,000
Farmers Employees and Agents PAC	$27,877
Amwest Insurance Group	$9,500
Chubb-Pacific Indemnity	$6,000
Financial Pacific Insurance	$6,000
Fireman's Fund	$6,500
Interline Insurance Services	$6,000
Alliance of American Insurance Co.	$5,500
Independent Insurance Agents	$5,000
Nationwide Mutual Insurance	$5,000
Pacific Pioneer Insurance	$5,000
Property Managers Insurance Service	$10,000
Safeco Insurance	$5,000
Scottsdale Insurance	$5,000
Zurich Insurance	$5,000
Fidelity National Title Insurance	$7,500
The Zenith	$15,000

Vote "No" on Proposition 213. It's "No-Fault" for Reckless Drivers.

KEN McELDOWNEY
Executive Director, Consumer Action

INA DELONG
Executive Director, United Policyholders

ROY ULRICH
Campaign Finance Reform Advocate

Argument Against Proposition 213

SAY "NO" TO NO-FAULT FOR RECKLESS DRIVERS . . .
VOTE "NO" ON PROPOSITION 213

In March, 2/3 of California's voters said "NO" to Proposition 200 – No-Fault auto insurance. We don't want a law that allows reckless drivers to avoid responsibility for their actions.

But Proposition 213 says that if a reckless driver who can afford insurance hits an innocent person who cannot . . . the reckless driver gets off without paying for all the injuries and damage they've done.

That's wrong.

The high cost of insurance makes it impossible for many poor and working people to buy insurance. If insurance companies won't sell affordable insurance, it is completely unfair to deny people full compensation for a car accident that is not even their fault.

YOU CAN SAY "NO" TO FELONS AND STILL . . .
VOTE "NO" ON PROPOSITION 213

Courts won't allow convicted felons to get damages for injuries they cause. So why are "felons" included in the title of Proposition 213?

The insurance companies pushing No-Fault want to divert your attention from their real agenda: boosting their profits to excessive levels.

Insurance companies make money anytime a reckless driver they insure is not held at fault.

The insurance companies couldn't get us to swallow No-Fault in one big gulp, so they're trying to feed it to us in little bites.

YOU CAN SAY "NO" TO DRUNK DRIVERS AND STILL . . .
VOTE "NO" ON PROPOSITION 213

California laws already say drunk drivers can't recover damages if they cause an accident. So why are they included in the title of Proposition 213?

The insurance companies have failed twice to get No-Fault insurance started in California. In Proposition 213 they are hiding the No-Fault idea behind wild talk about felons and drunk drivers.

NO MONEY-BACK GUARANTEE . . .
VOTE "NO" ON PROPOSITION 213

The No-Faulters argue that Proposition 213 will save Californians $323 million per year.

We've heard that line before.

There is nothing in Proposition 213 that says Californians will see their insurance rates go down. In No-Fault states, auto insurance premiums have increased an average of 40% in recent years.

No insurance rate reductions. No savings for consumers. The only people who benefit from this No-Fault scheme are reckless drivers . . . and the insurance companies who paid to put it on the ballot.

Insurance companies win, you lose.

SAY "NO" TO RECKLESS DRIVER NO-FAULT . . .
VOTE "NO" ON PROPOSITION 213.

HARVEY ROSENFIELD
Proposition 103 Enforcement Project

KEN McELDOWNEY
Executive Director, Consumer Action

INA DELONG
Executive Director, United Policyholders

Rebuttal to Argument Against Proposition 213

PROPOSITION 213 STOPS REWARDING DANGEROUS FELONS

California law allows felons convicted of resisting a peace officer *and causing serious injury or death to the peace officer to sue* a city, county or anyone else who gets in their way and accidentally injures the felon fleeing from that crime. The same goes for crimes such as carjacking, "drive-by" shooting resulting in murder, multiple hate crimes and many others. *Proposition 213 stops rewarding criminal behavior.*

PROPOSITION 213 REFORMS AN UNFAIR SYSTEM THAT REWARDS LAWBREAKERS AND PUNISHES THOSE WHO PLAY BY THE RULES

Under Proposition 213, every driver involved in an accident could recover their medical and out-of-pocket expenses. Proposition 213 says "NO" to additional big money awards that *drunk drivers, uninsured motorists and their attorneys go after when these lawbreakers are in an*

accident with an insured driver – even if they also cause the accident!

PROPOSITION 213 TAKES AWAY TRIAL LAWYERS' INCENTIVE TO SUE FOR OUTRAGEOUS AWARDS TO LINE THEIR OWN POCKETS

One-third of every dollar awarded for "pain and suffering" goes to attorneys, *and they want to ensure the most lucrative of all injury awards isn't taken from them.*

PROPOSITION 213 BENEFITS CONSUMERS BY MAKING INSURANCE MORE AFFORDABLE FOR EVERYONE

Law-abiding drivers pay additional premiums to protect themselves from uninsured drivers. Eliminating huge monetary awards for irresponsible drivers will save $327 million each year!

- *VOTE YES FOR PERSONAL RESPONSIBILITY.*
- *VOTE YES FOR CRITICAL REFORMS.*
- *VOTE YES FOR PROPOSITION 213.*

RONALD E. LOWENBERG
President, California Police Chiefs' Association

JAN MILLER
Chairman, Doris Tate Crime Victims Bureau

STEVEN H. CRAIG
President, Peace Offices Research Association of California

Proposition 213: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds sections to the Civil Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Title

This measure shall be known and may be cited as "The Personal Responsibility Act of 1996."

SECTION 2. Findings and Declaration of Purpose

(a) Insurance costs have skyrocketed for those Californians who have taken responsibility for their actions. Uninsured motorists, drunk drivers, and criminal felons are law breakers, and should not be rewarded for their irresponsibility and law breaking. However, under current laws, uninsured motorists and drunk drivers are able to recover unreasonable damages from law-abiding citizens as a result of drunk driving and other accidents, and criminals have been able to recover damages from law-abiding citizens for injuries suffered during the commission of their crimes.

(b) Californians must change the system that rewards individuals who fail to take essential personal responsibility to prevent them from seeking unreasonable damages or from suing law-abiding citizens.

(c) Therefore, the People of the State of California do hereby enact this measure to restore balance to our justice system by limiting the right to sue of criminals, drunk drivers, and uninsured motorists.

SECTION 3. Civil Justice Reform

Section 3333.3 is added to the Civil Code, to read:

3333.3. In any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony.

Section 3333.4 is added to the Civil Code, to read:

3333.4. (a) Except as provided in subdivision (c), in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies:

(1) The injured person was at the time of the accident operating the vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense.

(2) The injured person was the owner of a vehicle involved in the accident and the vehicle was not insured as required by the financial responsibility laws of this state.

(3) The injured person was the operator of a vehicle involved in the accident and the operator can not establish his or her financial responsibility as required by the financial responsibility laws of this state.

(b) Except as provided in subdivision (c), an insurer shall not be liable, directly or indirectly, under a policy of liability or uninsured motorist insurance to indemnify for non-economic losses of a person injured as described in subdivision (a).

(c) In the event a person described in paragraph (2) of subdivision (a) was injured by a motorist who at the time of the accident was operating his or her vehicle in violation of Section 23152 or 23153 of the Vehicle Code, and was convicted of that offense, the injured person shall not be barred from recovering non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary damages.

SECTION 4. Effective Date

This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to January 1, 1997.

SECTION 5. Severability

If any provision of this measure, or the application to any person or circumstances is held invalid or void, such invalidity or voidness shall not affect other provisions or applications that can be given effect without the invalid or void provision or application, and to this end, all of the provisions of this measure are declared to be severable.

SECTION 6. Conflicting Measures

In the event another measure to be voted on by the voters at the same election as this measure, and which constitutes a comprehensive regulatory scheme, receives

more affirmative votes than this measure, the electors intend that any provision or provisions of this measure not in direct and apparent conflict with any provision or provisions of that other measure shall not be deemed to be in conflict therewith, and shall be severed from any other provision or provisions of this measure that are in direct and apparent conflict with the provision or provisions of the other measure. In that event, the provision or provisions not deemed in conflict shall be severed according to Section 5 of this measure upon application to any court of competent jurisdiction.

Supreme Court, U.S.
FILED
JUL 21 1998
OFFICE OF THE CLERK

No. 97-2058

In The

Supreme Court of the United States

October Term, 1997

CONGRESS OF CALIFORNIA SENIORS, ET AL.,

Petitioners,

v.

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The First Appellate District Of California

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners' facial challenge to an initiative adopted by California's voters, which alters the measure of tort damages uninsured drivers may recover, raises a substantial federal question warranting Supreme Court review.

PARTIES TO PROCEEDINGS

The parties to the Court of Appeal proceeding are the following:

Petitioners: Congress of California Seniors, Utility Consumer Action Network, Proposition 103 Enforcement Project, Southern California Organizing Committee, Consumer Attorneys of California, Latino Issues Forum, The Greenlining Institute, Howard Owens, Ina De Long, and David S. Casey, Jr.

Respondents: Chuck Quackenbush, Insurance Commissioner of the State of California; Peter G. Stamison, Director of the Department of General Services of the State of California; and Kathleen Connell, Controller of the State of California

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STATEMENT OF THE CASE

California Civil Code section 3333.4, "The Personal Responsibility Act of 1996," was enacted by the people of the State of California in November 1996 as part of Proposition 213, pursuant to their reserved power of initiative. Cal. Const., art. IV, § 1. Proposition 213 added a new section to California's Civil Code provisions governing tort damages. Among other things, the statute eliminates awards of noneconomic damages, i.e., "pain and suffering" damages to uninsured drivers, drunk drivers and felons. Cal. Civil Code, § 3333.4 (West 1997).

Following adoption of the initiative, on December 17, 1996, a lawsuit was filed by several organizations and three taxpayers in the California Superior Court in and for the City and County of San Francisco, challenging the uninsured motorist provisions of the statute. In their state court action, Petitioners named the Insurance Commissioner of the State of California, the Director of the California Department of General Services, and the Controller of the State of California as defendants. None of the Petitioners alleged that the statute has actually been applied to them.[1] On March 5, 1997, Respondents filed a Demurrer to the complaint and opposed issuance of a preliminary injunction.

In April 1997, the Superior Court overruled Respondents' Demurrer and issued an injunction prohibiting

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[1] Petitioners' complaint is devoid of any allegation that any named plaintiff is an uninsured driver who was involved in an automobile accident. Likewise, none of the hyperbolic stories depicted by plaintiffs are alleged to have actually happened to any named Petitioner.

"any expenditure of State funds or resources for the purpose of implementing" the uninsured motorist provisions of Proposition 213. (JA 529.) After the Superior Court issued its injunction, Respondents sought extraordinary writ relief from the California Court of Appeal in and for the First Appellate District. The California Court of Appeal unanimously agreed with Respondents, concluding that Petitioners' myriad constitutional challenges to the statute were not legally cognizable, and commanded the Superior Court to enter judgment in favor of Respondents. The Court of Appeal ordered the Clerk of the Court to issue his peremptory writ of mandate compelling the Superior Court to vacate its injunction and order overruling Respondents' demurrer without leave to amend and to enter a new order sustaining the demurrer without leave to amend.[2]

Quackenbush v. Superior Court, 60 Cal. App. 4th 454, 70 Cal. Rptr. 2d 271 (1997). Petitioners' request for review by the California Supreme Court, mustering only one vote for review, was summarily denied in March 1998.

As established below, the petition should be denied because Petitioners' facial challenge to the state statute raises no substantial federal question.

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[2] Consequently, this case never proceeded past the pleading stage and Petitioners' reliance upon "evidentiary" matters outside of the complaint is inappropriate.

REASONS FOR DENYING CERTIORARI

I. PETITIONERS' FACIAL CHALLENGE TO CALIFORNIA'S STATUTORY REVISION TO THE MEASURE OF TORT DAMAGES FAILS TO RAISE ANY SUBSTANTIAL FEDERAL QUESTION

The petition raises no substantial federal question and, consequently, this matter does not warrant Supreme Court review.

Proposition 213 reflects the "considered judgment" of the citizens of California who voted for it. *See, Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991). California's initiative power is not "a right granted to the people, but a power reserved by them." *Associated Home Builders of the Greater East Bay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591, 590 P.2d 473, 477, 135 Cal. Rptr. 41 (1976). Indeed, the California Supreme Court views the power of initiative as "one of the most precious rights of our democratic process. . . ." *Rossi v. Brown*, 9 Cal. 4th 688, 695, 889 P.2d 557, 560, 38 Cal. Rptr. 363 (1995).

Here, Petitioners' challenges rest on pure speculation.[3] Indeed, the gravamen of Petitioners' constitutional

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[3] In a judicial challenge to Proposition 213 as applied, the California Court of Appeal, Second Appellate District, concluded that Proposition 213 was constitutional. *Yoshioka v. Superior Court*, 58 Cal. App. 4th 972, 978, 68 Cal. Rptr. 553 (1997). In *Yoshioka*, the plaintiff was an uninsured driver who allegedly sustained serious injuries in an automobile accident. *Id.* at 978, 68 Cal. Rptr. 2d at 555. Plaintiff claimed that Proposition 213 violated both the state and federal constitutions on due process and equal protection grounds. *Id.* at 979, 68 Cal. Rptr. at 556. Although the initiative applied retroactively to the plaintiff, the

attack merely "describes heart-rending circumstances of particular plaintiffs whose cases *might* be affected by Proposition 213." *Quackenbush,* 60 Cal. App. 4th at 462, 70 Cal. Rptr. 2d at 275 (1997)[emphasis added]. The Courts, however, have correctly refused to block the express will of millions of California voters without more than a "vague inkling of what the law actually does." *The Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 700 (9th Cir.) cert. denied ___ U.S. ___, 118 S.Ct. 397 (1997). The hypotheticals supporting Petitioners' challenges to Proposition 213 are wholly insufficient to overcome the deference due the expressed will of California's voters. *See, Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 8 (1982).

Petitioners' academic interest in hypothetical applications of the statute therefore fails to establish a compelling reason to grant this petition. See, *Raines v. Byrd,* ___ U.S. ___, ___, fn. 7, 117 S.Ct. 2312, 2320 (1997) [concluding that members of Congress lacked standing to challenge the "Line Item Veto Act" and finding the "various hypotheticals offered" by the Congressmen to "have no applicability. . . . "] The federal courts "lack competence to rule definitively on the meaning of state legislation . . . nor do they adjudicate challenges to state measures absent a showing of actual impact on the challenger. . . . " *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 1059 (1997). Consequently, the petition should be denied since the constitutionality of statutes ought not

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court concluded that the voters' decision to eliminate his recovery of noneconomic damages was constitutional. *Id.* at 981-92.

be decided except in an actual factual setting that makes such a decision necessary. *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988), citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-95 (1981).

Petitioners' heart-rending hypotheticals notwithstanding, Proposition 213 is simply a modification to the measure of tort damages recoverable by uninsured drivers who are involved in an automobile accident. This Court has repeatedly declined to intervene in similar situations. For example, where the California State Legislature altered tort rules applicable only to malpractice victims, the Court dismissed the appeals because the cases presented no substantial federal question. *Roa v. Lodi Medical Group*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985), appeal dismissed for want of a substantial federal question, 474 U.S. 990 (1985); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), appeal dismissed for want of a substantial federal question, 474 U.S. 892 (1985). Both *Roa*, 37 Cal. 3d 920, and *Fein*, 38 Cal. 3d 137, involved constitutional challenges to California's Medical Injury Compensation Reform Act of 1975 (MICRA). Similar to Proposition 213, MICRA places a limit upon the amount of noneconomic damages that a malpractice victim may be awarded, no matter how severely he or she is injured and without regard to the fact that he or she did not, in any way, contribute to the injuries. Cal. Civil Code, § 3333.2, subd. (b) (West 1997). Likewise, the Court has found that challenges to mandatory automobile insurance laws do not raise a substantial question of constitutionality. *Ex Parte Poresky*, 290 U.S. 30 (1933) [denial of leave to file for writ of mandamus under former "three-judge panel" statutes].

The Court has also declined to review California's statutory provision which eliminates punitive damages awards for one class of plaintiffs, i.e., wrongful death plaintiffs. *In re Paris Air Crash*, 622 F.2d 1315 (9th Cir.), cert. denied sub nom., 449 U.S. 976 (1980). Also, the Court recently declined to review another initiative adopted by California's voters – Proposition 209. *The Coalition for Economic Equity v. Wilson*, 122 F.3d at 692, cert. denied, ___ U.S. ___, 118 S.Ct. 397 (1997).

Petitioners' challenges to Proposition 213 fail to raise substantial constitutional questions and the petition should be denied.

II. PROPOSITION 213 IS RATIONALLY RELATED TO LEGITIMATE PURPOSES AND, THEREFORE, THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTION

Proposition 213 clearly passes the rational basis test and, therefore, the initiative does not present a substantial federal question.

A. Proposition 213 Comports with the Equal Protection Clause

The definition of negligence and the effect to be given to it, as a rule of conduct, is subject to legislative modification. *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919) [rejecting due process and equal protection challenges to state statute which replaced negligence damages with workers' compensation awards].

Indeed, "as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit." *Id.* As the Court reiterated twenty years ago in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), " . . . cases have clearly established that a person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby."[4] *Id.* at 88, fn. 32 [citations and internal quotations omitted].

California law plainly contemplates the ability to modify the general measure of tort damages set forth in California Civil Code section 3333 (West 1997) ["except where otherwise expressly provided" by the Civil Code, the measure of tort damages is the amount that "will compensate for all the detriment proximately caused thereby. . . . "]. By enacting Civil Code section 3333.4, California's voters decided that automobile accident

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[4] In *Duke Power*, the Court upheld the constitutionality of the Price-Anderson Act's statutory ceiling on recoverable damages, even though the Act carved out the private nuclear power industry for federal treatment in tort liability where, otherwise, state common law would govern. *Duke Power Co.*, 438 U.S. at 93-94. Other legislative alterations in the tort field have withstood constitutional challenge. Of particular interest are the drastic changes in the traditional negligence standard for liability, with the no-fault workers' compensation program being one such illustration. See, *Lower Vein Coal Co. v. Industrial Bd.*, 255 U.S. 144 (1921); *New York Central R.R. v. White*, 243 U.S. 188 (1917).

plaintiffs who are injured while driving in violation of California's mandatory Financial Responsibility Laws will not be awarded noneconomic damages in most situations.[5]

Consistent with the Constitution, the voters could repeal an entire category of damages because they rationally concluded that eliminating noneconomic damages awards to uninsured drivers would address the problem of skyrocketing insurance costs. See, *Duke Power Co.*, 438 U.S. at 88, fn. 2.

As the Court stated in *Vance v. Bradley*, 440 U.S. 93 (1979), "we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Id.*, at 97. Speculation regarding other alternatives that may have been, but were not, used to further a legitimate goal is irrelevant to an equal protection analysis. *Duke Power Co.*, 438 U.S. at 94. If any one basis substantiates the classification, the statute must be upheld. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 465 (1981).

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[5] The initiative creates a hierarchy of tort damages awards for persons who are not "personally responsible," with felons being allowed no tort damages for injuries suffered in connection with their commission of the crime, automobile accident plaintiffs who were drunk at the time of their accident being denied noneconomic damages under all circumstances, and automobile accident plaintiffs who were uninsured at the time of the accident being allowed economic damages, but not noneconomic damages. Cal. Civ. Code, § 3333.4 (West 1997).

Petitioners do not attack the purposes[6] of the initiative but, rather, challenge the classification of uninsured drivers. Contrary to Petitioners' assertions, the classification is not arbitrary.

First, there is a longstanding, strong presumption that a legislative body understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. *Middleton v. Texas Power & Light Co.*, 249 U.S. at 157-58. Even though a statute might have been extended to other classes, the failure to do so does not amount to a constitutional objection. *Id.*

In addition, the statutory classification of uninsured drivers is rationally related to the legitimate goal of reducing insurance costs by encouraging drivers to purchase automobile insurance, thereby increasing the pool of insured drivers. In addition, the classification furthers at least one other legitimate goal – restoring balance to our justice system. Eliminating the amount of recovery

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[6] The voter's pamphlet reveals numerous interests the electorate considered in enacting this initiative. Essentially such interests can be narrowed down to two broad concerns the voters took into account: (1) the interest in restoring balance to our justice system and (2) the interest in reducing costs of mandatory automobile insurance. *Yoshioka*, 58 Cal. App.4th at 978, 68 Cal. Rptr.2d at 555 [rejecting an as-applied challenge to the uninsured motorist provisions of Proposition 213]. Addressing concerns over insurance rates constitutes a legitimate state interest. *Dimond v. District of Columbia*, 792 F.2d 179, 186-87 (D.C. Cir. 1986).

for noneconomic damages for uninsured drivers is rationally related to restoring balance to our justice system because it results in a decrease in the amount of litigation filed. *Yoshioka*, 58 Cal.App.4th at 990-91, 68 Cal.Rptr.2d at 563. "Since recovery would be limited to special damages (an easily verifiable amount that encompasses little dispute), pending matters will likely result in settlement. This will ultimately reduce the cost of supporting the court system." *Id.* Having established at least one valid connection, the rational basis test requires no further justification of Proposition 213. *Clover Leaf Creamery Co.*, 449 U.S. at 465.

Petitioners, nonetheless, assert that the statute could have been drafted so as to include other groups, such as uninsured pedestrians (Pet. at 12), drivers who run red lights (Pet. at 13), and other classes of plaintiffs (Pet. at 13). Whether the voters could or should have focused on other plaintiffs is not a substantial federal question because speculation regarding other alternatives that may have been, but were not, selected is irrelevant. *Duke Power Co.*, 438 U.S. at 94. Even if it were assumed that Proposition 213 might be invalid as applied in some particular situation, that does not mean that the initiative is facially invalid. *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 188 (1991). California's voters therefore validly selected one phase of tort reform – the costs associated with uninsured drivers – and need not apply their chosen remedy to other aspects of California's tort laws.

B. Proposition 213 Does Not Deny Uninsured Drivers Access to Courts

The initiative, contrary to Petitioners' assertion, likewise does not unconstitutionally infringe upon uninsured drivers' access to the court system. While "regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid"[7] (*Procunier v. Martinez*, 416 U.S. 396, 419 (1974) [prisoner's due process right to access the court system]), there is nothing on the face of Proposition 213 that imposes any restriction upon an uninsured driver's ability to prosecute a lawsuit. Petitioners nonetheless claim that complying with California's mandatory insurance laws "in essence" places a cost requirement on uninsured drivers who wish to file lawsuits. Assertions of that nature were found not to be of any constitutional dimension over a half century ago. *Ex*

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[7] There is a distinction between the constitutional right of access to the courts and the constitutional right to counsel. The right of access is a right of "access" and not of "representation." *Cornett v. Donovan*, 51 F.3d 894, 899 (9th Cir. 1995) [rejecting claims of involuntarily committed patients that the right of access required the state to provide law library or legal assistance]. As the California Court of Appeal recognized, the "access to court" argument hinged on Petitioners' view that plaintiffs actually affected by Proposition 213 would be unable to hire attorneys because attorneys' contingency fees normally are paid from noneconomic damages. *Quackenbush*, 60 Cal. App. 4th at 468, 70 Cal. Rptr. 2d at 279. This argument only "implies that the present system for hiring and paying attorneys is sacrosanct and may not be disturbed. It assumes that uninsured litigants and attorneys will be unable to find other ways to structure their relationships. At most, [Petitioners] casts doubt on the wisdom of the measure, not its constitutionality." *Id.*

Parte Poresky, 290 U.S. 30. Similarly, compliance with the state's Financial Responsibility Laws in order to seek noneconomic damages is not a cost requirement in this case. Cf, *Boyden v. Commissioner of Patents,* 441 F.2d 1041, 1045-46 (1971) (Levanthal, concurring) ["By no means does the Constitution embody as a present requirement an egalitarian philosophy that supposes that all men can be put in exactly equal condition as to all matters involving the government. [For example], a man cannot insist that his indigency establishes a constitutional right to drive a car without, e.g., paying the cost of insurance required for the protection of others, or of safety devices and government inspection services."]

Consequently, Petitioners have failed to establish a substantial federal question and the petition should be denied.

C. Proposition 213 Comports with the Due Process Clause

Likewise without merit is Petitioners' request that the Court, by way of the Due Process clause, accept review of their Petition and provide a judicial assessment of the wisdom or fairness of Proposition 213. The Due Process clause is not violated simply because injured persons cannot recover as much as they could prior to the statute's enactment. *Duke Power Co.,* 438 U.S. at 93.

Moreover, as the California Court of Appeal properly found, the issue of whether an uninsured plaintiff could employ a *de facto* insured theory was not before the court. The issue is, likewise, not properly before this Court.

Finally, the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972). The range of interests protected by procedural due process is not infinite. *Id.* Plainly, however, the underlying right must have come into existence before it can trigger due process protection. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). As established above, no plaintiff has a vested property interest in recovering any particular type or component of damages. *Duke Power Co.*, 438 U.S. at 59, *Middleton v. Texas Power & Light Co.*, 249 U.S. at 163. Consequently, an uninsured plaintiff has no due process right to a hearing on the issue of why he or she was uninsured.

CONCLUSION

For the reasons stated, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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